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WM. R. STA

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 222.

JOHN ALDEN LEE, individually and as trustee of LEWIS C. PAINE,

Plaintiff-Appellant,

v.

LEHIGH VALLEY COAL COMPANY, impleaded with KATE P. DIXON, not served or appearing,

Defendant-Respondent.

APPELLANT'S BRIEF.

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JOHN ALDEN LEE, individually and as trustee of LEWIS C. PAINE,
Plaintiff-Appellant,

against

LEHIGH VALLEY COAL COMPANY, impleaded with KATE P. DIXON, not served or appearing,
Defendant-Respondent.

APPELLANT'S BRIEF.

Statement.

There is but one question involved in this appeal, viz.: the question of jurisdiction of the U. S. District Court for the Southern District of New York, to hear and determine the issues presented by the complaint herein either with or without the inclusion of Kate P. Dixon as a party plaintiff or defendant.

A motion by order to show cause (p. 3, fol. 7) to dismiss the complaint for want of such jurisdiction was made by the defendant, Lehigh Valley Coal Company, a proper defendant and one over whom the court had complete jurisdiction (p. 48, fol. 52), and was granted by Hon. Learned Hand, Jr., upon the ground stated in the order, judgment and decree appealed from, viz.:

> "Ordered, adjudged and decreed that the motion to dismiss be and the same is granted and that the District Court

of the United States for the Southern District of New York is without jurisdiction to hear and determine this action on the ground of diversity of citizenship of the parties by reason of the fact that the defendant, Kate P. Dixon, a citizen and resident of Pennsylvania, is an indispensable and necessary party to this action and is so united in interest with the plaintiff herein that she must be aligned as a party plaintiff, and that the grounds alleged in the bill of complaint for making her a party defendant are not sufficient to vest this court with jurisdiction of the parties and cause of action" (p. 3, fol. 6).

Kate P. Dixon is shown to be a resident of Wilkes-Barre, Pennsylvania; that she had not been served with process; had not appeared herein and had declined to appear or to be represented as a party (p. 50 bottom).

The assignment of errors clearly presents the one point involved (p. 2, fol. 1).

The complaint states that Kate P. Dixon had been asked to join in the action as a party plaintiff but had refused, and because she was a proper party, had been made a party defendant (par. 26, p. 16).

The complaint is brought in equity because of certain mesne litigations, settlements, and agreements fully set forth therein, to recover large arrearages of royalties from the working, excavation and sale of coal and to recover for the rental of certain coal underlying 75 acres of land in Luzerne County, Pennsylvania, pursuant to the express terms and provisions of a 999 year lease of said coal, not of the land itself except for purposes of user, the said lease having been made on December 15, 1888, by the predecessors in title of plaintiff and Kate P. Dixon to the defendant, Lehigh Valley Coal Company and having been, since its making, in the full and complete use and occupation of the lessee.

Two clauses of the lease are, we think, of especial importance to the point under discussion, viz., the one on page 17 reading:

"Whereas the parties of the first part are seized in fee of all the coal in, under, and upon all that piece or parcel

of land situate in Wyoming Borough, in said County and State, bounded and described as follows."

And clause 15, page 22, reading:

"All and singular the grants, covenants, agreements and undertakings hereinbefore contained and made, or which are to be kept and performed by the parties of the first part, shall be binding upon each and every of them, their heirs, executors, administrators and assigns and inure to the benefit of the said party of the second part, their successors and assigns; and all and singular the grants, covenants, agreements and undertakings hereinbefore contained which are to be kept and performed by the said party of the second part, shall be binding on them, their successors and assigns and shall inure to the benefit of each and every of the said parties of the first part, their heirs, executors, administrators and assigns."

In clause Eleventh of the complaint, Kate P. Dixon's interest in this controversy, and in paragraphs Twelfth and Fourteenth, the plaintiff's interest, is stated in the following words:

"Eleventh: On information and belief that heretofore and before the termination of the trust above stated, Caroline M. Pettibone died in Luzerne County, Pennsylvania, and the defendant, Kate P. Dixon, succeeded to and became vested and now is vested, in fee, with all the interest of said Caroline M. Pettibone in said leased premises (fol. 21), that is to say of, in and to an undivided one-half interest therein and to an equal, undivided one-half interest, as a tenant in common with this plaintiff in the lease rental described in paragraph Eight of this complaint and in Exhibit 1, hereto attached.

Twelfth: On May 31, 1917, said Maggie S. Paine died in the City, County and State of New York, leaving her surviving as her sons and sole heirs at law and next of kin, John Alden Lee, William S. Paine and Lewis C. Paine,

all of full age, and leaving no other children and no children of any deceased child.

Fourteenth: By her last will and testament dated and published January 25, 1917, and duly admitted to probate by the Surrogates' Court of New York County on the 28th day of June, 1917, said Maggie S. Paine devised and bequeathed to her two sons, John Alden Lee and Lewis C. Paine, all the property and all the interest in the trust estate which she had so as aforesaid purchased and received by deed and assignment from her said son, William S. Paine, and thereupon and thereafter, said John Alden Lee, this plaintiff, and said Lewis C. Paine became, were and now are vested in fee simple absolute with the undivided one-half part of said premises, so as aforesaid leased to the defendant, Lehigh Valley Coal Company, and of the lease rentals thereof under said lease each being entitled to a one-quarter part or interest therein."

LEGAL ARGUMENT.

POINTS.

I.

The legal principles involved in this appeal have been so repeatedly before this court and the Circuit Court of Appeals that they are settled and established, the only difficulty being to apply them to the particular issues presented by each case.

1. *For the purposes of this motion, all facts properly stated in the complaint are conceded to be true and to be as stated.*

Montgomery's Fed. Procedure, 2nd Ed., Section 882, and cases cited thereunder.

2. *It is only where the complaint includes or excludes absolutely indispensable parties to a proper determination of the issues raised that the fatal inclusion or exclusion of same deprives the court of jurisdiction to hear and determine the issues and that the complaint can be dismissed.*

> Salem Trust Co. v. Mffrs. Finance Co., Adv. Sheets No. 10, March 15, 1924, page 270, decided by this court, Feb. 18, 1924.

In the course of the opinion in the Salem Trust Co. case, Mr. Justice Butler wrote:

> "On the question of jurisdiction, an unnecessary and dispensable party will not be considered." Citing cases.

In determining the question of jurisdiction in this particular case, there are several questions necessary to be considered, viz.:

(a) Could the question of jurisdiction, because of Kate Dixon, be raised by the Lehigh Valley Coal Co. a proper and indispensable party already and indisputably within the jurisdiction of the court below, for, unless Kate Dixon was an "indispensable" party, it is well settled, as we understand it, that it could not be so raised, the objection being purely a personal one to Kate Dixon.

> Smith v. Atchison T. & S. F. R. Co., 64 Fed., 1, 2, 3; Camp v. Gress, 250 U. S., 308, 316.

(b) Does not Section 1032 of the U. S. Compiled Statutes, West Ed., page 1109 (Jud. Code, §50), eliminate and answer the objection?

That section provides:

> "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may

> entertain jurisdiction, and may proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

The above provision of the Compiled Statutes is repeated in Section 50 of the Judicial Code.

An appearance by Kate Dixon in this action and an answer by her would have waived the question of jurisdiction on her part and enabled the court to proceed.

Above statute: Jones v. Andrews, 10 Wall., 327.

(c) Kate P. Dixon, while a proper and wholly suitable party for a complete determination of the issues raised and a full accounting and release of the defendant, Lehigh Valley Coal Company, from liability was not an "indispensable" party.

In our statement, supra, we called attention to paragraph 15 of the lease agreement sued upon which provides that

> "all and singular the grants, covenants, agreements and undertakings hereinbefore contained which are to be kept and performed by the said party of the second part shall be binding on them, their successors and assigns and shall inure to the benefit of *each and every* of the said parties of the first part, their heirs, executors, administrators, and assigns."

Plaintiff and Kate Dixon are tenants in common each of an undivided one-half of the fee of the 75 acres of land and of the coal underlying the surface which is leased to the Lehigh Valley Coal Company.

The Lehigh Valley Coal Company is completely bound by the allegations of the complaint.

By the specific terms of the lease, each fee owner is entitled to an equal one-half of the lease rental called for thereby, and

this ownership carries with it, naturally and necessarily, a personal cause of action in each to recover his or her aliquot share of the same.

In Elmendorf v. Taylor, 10 Wheat., page 152 (6 Law Ed., 289), the exact question now at issue came before this court and Mr. Chief Justice Marshall, at page 166, wrote:

> "2. It is contended that he is a tenant in common with others, and ought not to be permitted to sue in equity without making his co-tenants parties to the suit.
>
> This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of Equity require that all the parties concerned in interest shall be brought before them that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself and is subject to its discretion. It is not like the description of parties an inflexible rule, a failure to observe which turns the party out of court, because it has no jurisdiction over his cause; but, being introduced by the court itself, for the purpose of justice, is susceptible of modification for the promotion of those purposes."

Judge Sanborn, writing for the Circuit Court of Appeals, Eighth Circuit, in O'Neill v. Wolcott Mining Co., 174 Fed., 527, at page 536, stated the settled rule in the following language:

> "An indispensable party is one who has such an interest in the subject-matter of a controversy that a final decree between the parties before the court cannot be made without injuriously affecting his interest or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject-matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree between them, is a proper party." (Citing cases.)

The rule that a tenant in common may sue without joining

his co-tenants as parties plaintiff has long been a settled and well established rule of law.

> Cruger v. McLaury, 41 N. Y., 219, 222, 223, and cases cited in opinion;
> Stephen v. Beall, 22 Wall., 329.

In Whittle v. Actis, 55 Fed., 919, Judge Sage wrote for the court:

> "A tenant in common recovers only his aliquot part or share, Mobley v. Bruns, 59 Pa. State, 481; Minke v. McNamee, 30 Md., 294; Jones v. Walker, 47 Ala., 175. Two or more tenants in common may sue in ejectment, or any one may sue alone for his share. Tilden v. Tilden, 13 Gray, 108; Bush v. Bradley, 4 Day, 303; Penrod v. Danner, 19 Ohio, 218; Shepherd v. Ryers, 15 John, 501."

Respondent succeeded in the court below by virtue of Equity Rule 37, reading:

> "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs * * * any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants but when anyone refuses to join, he may for such reason be made a defendant."

Chief Justice Marshall disposed of this contention in the Elemendorf case, *supra*.

They further relied upon the decision of Judge Lacomb in Menefee v. Frost, 123 Fed., 633, which case is readily distinguishable from the case at bar, and if it were not, must yield to the accumulated weight of authority against the holding.

The position assumed by the defendant in this action would be quite inexplicable to plaintiff's attorney from a purely business standpoint were it not for the fact that for eight years,

viz.: from 1905 to 1913, the Lehigh Valley Coal Company never paid a dollar of rental under this 999 year lease, and, in 1913, when it was brought to book by Glaze (see Ex. 4, p. 28) was able to settle the accrued rents for fifty cents on the dollar, and, since 1913, another period of nearly eleven years, it has never paid a dollar of rental although at all times in complete possession of the demised premises to the exclusion of plaintiff or anyone else, and it doubtless expects to continue another ten years without the payment of another dollar if it can prolong this litigation for that length of time.

II.

For the reasons stated, it is respectfully submitted that the order and decree appealed from should be reversed, with costs and the cause remitted to the District Court to proceed with the same in due course.

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